No. 96-1151 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re LOUIS F. ALLEN, *et al.*,

Petitioners.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND THE HONORABLE PAUL V. NIEMEYER, M. BLANE MICHAEL, AND DIANA GRIBBON MOTZ, CIRCUIT JUDGES

BRIEF OF RESPONDENT LLOYD'S IN OPPOSITION

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QUESTION PRESENTED

When the Court of Appeals for the Fourth Circuit has determined, as a matter of law, to enforce choice of forum and choice of law agreements which require the Petitioners to litigate claims arising out of their membership of or underwriting at Lloyd's in the English courts under English law, should the Court issue an extraordinary writ of mandamus to vacate the judgment of the court of appeals ordering dismissal of the case when (i) the parties were properly before the court, (ii) the case was properly before the court on a motion for a stay pending appeal of a preliminary injunction granted by the district court, and (iii) the judgment of the court of appeals is consistent with the decisions of this Court and with the decisions of every other court of appeals to decide the issue?

PARTIES TO THE PROCEEDING

Respondent Lloyd's (see infra n. 1 detailing Lloyd's identity), appellant in the court below, is not a publicly held corporation, has no parent corporation, and has no subsidiaries which are not wholly owned.

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OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

Respondent Lloyd's,[1] defendant and appellant below, respectfully submits this brief in opposition to Petitioners' request for a writ of mandamus. The United States Court of Appeals for the Fourth Circuit properly exercised its power in determining that, as a matter of law, Petitioners could not maintain their action against Lloyd's in the United States and that, therefore, Petitioners' action must be dismissed.

FEDERAL RULE OF APPELLATE PROCEDURE INVOLVED

Federal Rule of Appellate Procedure 2 provides that:

> In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

STATEMENT OF THE CASE

Factual Background

Lloyd's is the regulator of an international insurance market located in London, England. The Council of Lloyd's

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1 Respondents Corporation of Lloyd's, Society of Lloyd's, and Council of Lloyd's are herein collectively referred to as "Lloyd's." The respondent designated in the Petition as Lloyd's of London is a registered trademark that has no legal or factual existence, and is not an unincorporated association.

exercises regulatory authority over the market pursuant to a statutory delegation by the British Parliament. Petitioners are ninety-three underwriting members of the Lloyd's market known as "Names," and, as such, are subject to regulation by Lloyd's. Names are individual insurers who receive premiums from insureds and are directly liable to insureds for the insurance risks they have underwritten. A Name's liability is several, not joint; he bears no responsibility for the obligations of other Names, and has no right to share in the profits of other Names.

Each Name, as a condition of membership, is required to execute a General Undertaking whereby the Name agrees to comply with the Lloyd's Act 1871-1982, any subordinate legislation made thereunder, and the rules and byelaws of Lloyd's. Since 1986, the General Undertaking required to be executed by each Name provided that his rights and obligations relating to membership and underwriting "shall be governed by and construed in accordance with the laws of England," and that "the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at Lloyd's . . ." (the "Choice Clause"). As of September 1, 1996, there were approximately 34,000 Names worldwide, of whom approximately 2,900 were United States residents. Names are resident in more than eighty countries, but the great majority are residents of the United Kingdom. Lloyd's ceased admitting individual U.S. residents as Names in August, 1995.

In 1988-92, the Lloyd's insurance market experienced aggregate underwriting losses of £8 billion. Many Names faced open-ended liabilities, policyholders faced uncertainty about Names' ability to satisfy claims, and Names who continued to underwrite faced the possible collapse of the Lloyd's market. In addition, there was a wave of intra-market litigation.

In order to resolve these crises, Lloyd's, after years of study and work, proposed a plan of Reconstruction & Renewal ("R&R"), which was reviewed and approved by British insurance regulators. The R&R plan had two key components. First, a settlement fund of £3.2 billion was assembled by Lloyd's from various sources, including underwriting agents and brokers doing business in the Lloyd's market, and Lloyd's itself. Each Name was made an individually-determined offer from this fund in exchange for a release of potential and actual claims against Lloyd's and other market participants. Second, Lloyd's created a new English reinsurance company, Equitas, to reinsure the Names' liabilities arising from pre-1993 underwriting. Each Name was charged an individually-calculated premium in exchange for reinsurance for his pre-1993 underwriting liabilities. Pursuant to an irrevocable authority they had previously given, all Names were required to purchase such reinsurance from Equitas whether or not they accepted their individual settlement offers. Names who accepted their settlement offers were able to use the settlement proceeds to offset the cost of their respective Equitas premiums. As is common in other global settlements involving numerous claims and parties, consummation of the R&R plan was conditioned on, among other things, acceptance by a sufficient number of Names of their respective settlement offers by August 28, 1996. In total, the R&R plan was a transaction in excess of $15 billion.

Procedural History

On June 28, 1996, Petitioners brought an action in the United States District Court for the Eastern District of Virginia against Lloyd's and Equitas seeking preliminary and permanent injunctive relief preventing Lloyd's from offering settlements to all Names worldwide as part of the R&R plan and preventing the reinsurance of all Names' pre-1993 underwriting liabilities

by Equitas.[2] As Petitioners were aware from Lloyd's public statements, it was critical for the conditions for consummation of the R&R transaction to be met by August 28, 1996, in order to comply with solvency requirements imposed by the U.K. Department of Trade & Industry ("DTI"), the government agency charged with oversight of the British insurance industry.[3]

The complaint alleged that Petitioners were entitled, under various provisions of the federal securities laws, to additional information concerning the R&R plan prior to deciding whether to accept their individual settlement offers. The only remedy Petitioners sought was preliminary and permanent injunctive relief stopping the R&R plan until more information had been provided. Indeed, prior to the dismissal of their case, Petitioners repeatedly disclaimed an intention to seek any monetary relief as a result of the alleged violations of federal law. Petitioners filed an Amended Complaint on July 11, 1996, again seeking only preliminary and permanent injunctive relief stopping the R&R plan until more information was provided. On July 19, 1996, Petitioners moved for a preliminary injunction based on alleged violations of Sections 10(b) and 14(a) of the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78n(a).

On July 26, 1996, Lloyd's moved to dismiss the action based on, among other things, improper venue pursuant to Fed. R. Civ. P. 12(b)(3) in light of the Choice Clause in the General

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2 Petitioners subsequently voluntarily dismissed Equitas from the action.

3 The British Government submitted an amicus curiae brief to the District Court which confirmed the urgent timing of R&R as well as the extensive review and oversight of R&R by the DTI.

Undertaking. Lloyd's also opposed Petitioners' request for a preliminary injunction. Although Lloyd's argued that the motion to dismiss should be heard before the preliminary injunction motion, Petitioners insisted that they wanted the opportunity for discovery on both motions, and the district court ordered that the two motions would be heard together. The parties then agreed on a briefing schedule and on a schedule for the taking of discovery on both motions. The court set no limit on discovery, and Lloyd's did not refuse to provide any discovery requested by Petitioners.

On August 6, 1996, the same day that Lloyd's was required to, and did, file its opposition to Petitioners' motion for preliminary injunction, and the same day Petitioners were required to, and did, file their opposition to Lloyd's motion to dismiss the action, Petitioners filed a motion for leave to file a Second Amended Complaint. The Second Amended Complaint merely added federal securities laws claims based on the same alleged facts and occurrences, and still sought only preliminary and permanent injunctive relief against consummation of the R&R Plan. On August 19, 1996, Lloyd's filed its opposition to Petitioners' motion for leave to file a Second Amended Complaint.

On August 19 and 20, 1996, a combined hearing on Petitioners' motion for a preliminary injunction and Lloyd's motion to dismiss was held. Both sides presented direct testimony and cross-examined witnesses presented by their opponent. Both sides offered documentary evidence as well as expert testimony by way of affidavit. Both sides made oral argument on both motions to the district court. The district court did not refuse to hear any witness or argument, nor did it reject any offered exhibit. Petitioners opposed Lloyd's motion to dismiss on the grounds that: 1) their claims were not covered by the Choice Clause; and 2) the anti-waiver provision of the securities laws rendered the Choice Clause unenforceable as contrary to public policy. Although Lloyd's presented evidence that all Names were required to sign a General Undertaking

containing the Choice Clause as a condition of membership or continued underwriting, Petitioners never attempted to rebut this evidence and never questioned that all Petitioners had signed the General Undertaking containing the Choice Clause. Nor did Petitioners assert that Lloyd's had failed to meet any burden of proof on that issue. The motions for a preliminary injunction and to dismiss were fully submitted at the close of the hearing, with both sides having had a full opportunity to develop the record for both motions. The district court reserved judgment.

Because of the rapidly approaching August 28, 1996 deadline for the R&R plan, Lloyd's alerted the Clerk's office for the United States Court of Appeals for the Fourth Circuit that if the district court entered an injunction preventing consummation of the R&R plan, Lloyd's would move to stay the injunction and would seek an expedited hearing. Contrary to Petitioners' assertions, Petition for a Writ of Mandamus ("Pet.") 7, 14, that they were unaware of these contacts, Lloyd's informed Petitioners' counsel by fax cover letter dated August 22, 1996 that discussions were being held with the Clerk's office. Appendix for Respondents ("Resp. App.") 4a-7a.

The District Court's Decision

At approximately 7:00 p.m. on Friday, August 23, 1996, the district court issued an order accompanied by a 141 page opinion. Appendix for Petitioners ("Pet. App.") 17a (opinion also reported as Allen v. Lloyd's of London, No. 3:96cv522, 1996 U.S. Dist. LEXIS 12300, 1996 WL 490177 (E.D. Va. Aug. 23, 1996), rev'd, 94 F.3d 923, (4th Cir. 1996)). In the opinion, the district court first granted Petitioners' motion to file a Second Amended Complaint and denied the motion to dismiss.

Based on the unrebutted evidence submitted by Lloyd's, the district court found that all Names were required to sign the General Undertaking containing the Choice Clause, Pet. App. 32a-33a, 46a n.2, and that Petitioners' claims were covered by the Choice Clause, id. at 47a-49a, but found that the Choice Clause was unenforceable because it acted as a waiver of the

protections of the securities laws. Id. at 70a-71a. The district court acknowledged that it was parting company with the holding of every Circuit Court that had considered the issue. See Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021 (1992). It did so, in part, in reliance on Petitioners' repeated insistence that they were seeking only additional disclosures, rather than damages. Pet. App. 71a. The district court then denied Lloyd's motion to dismiss the action. Id. at 146a.

The district court then granted a preliminary injunction preventing Lloyd's from requiring *any* United States Names to accept their settlement offers, based on its ruling that Lloyd's was soliciting proxies from United States Names in violation of Section 14(a) of the Exchange Act.[4] The preliminary injunction also prevented Lloyd's from causing Equitas to reinsure the outstanding pre-1993 liabilities of *any* United States Names, even those who had chosen to accept their settlement offers. Id. at 144a. The district court's order, if it remained in place, would have spelled the end of the R&R plan, and would have imperiled the very survival of the Lloyd's market.

Lloyd's immediately moved for a stay pending appeal of the district court's order granting a preliminary injunction. August 23, 1996 Hearing Transcript, Resp. App. 9a. This request was denied. Id. at 10a-11a. Counsel for Lloyd's stated, on the record, that an expedited appeal would be taken to the United States Court of Appeals for the Fourth Circuit. Id. at 9a.

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4 The District Court did not rule on Petitioners' request for a preliminary injunction to enjoin alleged violations of Section 10(b).

Lloyd's filed a Notice of Appeal and a motion for a stay pending appeal of the district court's order that same evening. Pet. App. 153a-156a.

The Fourth Circuit's Decision

Early the next day, the Fourth Circuit notified the parties that it had scheduled an expedited hearing for August 27, 1996 on Lloyd's request for a stay pending appeal and designated a three judge panel to hear the matter. Both sides filed overlong briefs and extensive appendices. Lloyd's included the entire transcript of the proceedings before the district court in its appendix, together with all affidavits submitted by Lloyd's to the district court.

Lloyd's argued that the district court had improperly applied the Fourth Circuit's test for the grant of a preliminary injunction and that Lloyd's had a likelihood of success on the merits of its appeal. In particular, Lloyd's argued that because the Choice Clause precluded any court other than a court in England from hearing the dispute, the district court had erred in finding that Petitioners had any likelihood of success on the merits. Petitioners argued that the district court had correctly applied the test for the grant of a preliminary injunction and that the district court's decision on the Choice Clause was correct. Petitioners did not claim that any Petitioner had failed to sign the Choice Clause, or that Lloyd's had failed to present adequate evidence on that issue.

On August 27, 1996, the Fourth Circuit held nearly three hours of oral argument on Lloyd's motion for a stay pending appeal. Following a recess, the panel returned and issued the following order:

> On the motion of appellants to stay the district court's injunction entered August 23, 1996, and upon consideration of the briefs, papers, and extensive arguments of counsel, the court grants the motion. Because the court's decision rests on its

> determination, to be articulated in a later opinion, that the contractual provisions among the parties selecting the law of and a forum in the United Kingdom should be enforced, we reverse and remand this case with instructions that the district court dismiss it.

August 27, 1996 Order, Resp. App. 3a.

By the close of business on August 28, 1996, over 90% of all Names, including many of the Petitioners, had accepted their settlement offers. The R&R plan was declared effective by Lloyd's and the DTI on August 29, 1996.[5]

On August 30, 1996, Petitioners moved for reconsideration and suggested rehearing *en banc* of the Fourth Circuit's decision based on the same arguments set forth in their petition to this Court: that the Fourth Circuit had exceeded its jurisdiction; that the Fourth Circuit's decision that the Choice Clause was enforceable was wrong; and that there was evidence which they had not presented to the district court showing that not all Petitioners had agreed to the Choice Clause. On September 3, 1996, the Fourth Circuit issued an opinion explaining the reasons for its decision. Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996). On September 9, 1996, Petitioners filed a Supplemental Brief in Support of their Emergency Motion for Reconsideration or, in the Alternative, Suggestion for Rehearing *en banc*, criticizing the Fourth Circuit's opinion. On September 11, 1996, the Fourth Circuit,

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5 Petitioners are requesting relief from this Court – a new hearing before the Fourth Circuit on whether a preliminary injunction should have issued – that has been rendered moot. The R&R plan has already been declared effective, the time for Names to accept or reject their settlement offers has passed, and all outstanding pre-1993 liabilities have been reinsured by Equitas.

without requesting a response from Lloyd's, denied Petitioners' motion. Pet. App. 147a-149a.

Petitioners thereafter filed a motion to stay the issuance of the mandate for thirty days to allow them to prepare a petition for a writ of certiorari or a petition for a writ of mandamus or prohibition to this Court. The grounds for this motion were the same as the grounds for Petitioners' motion for reconsideration. On September 20, 1996, the Fourth Circuit, without requesting a response from Lloyd's, denied Petitioners' motion. Id. at 150a-152a. The mandate, which directed dismissal of the case, issued on September 20, 1996. An order of dismissal was entered by the district court on January 6, 1997, following the issuance of a Writ of Mandamus by the Fourth Circuit on December 31, 1996.[6]

On December 10, 1996, Petitioners submitted a "Petition for a Writ of Mandamus or, Alternatively, Certiorari" with this Court. By letter dated January 2, 1997, the Clerk of the Court informed Petitioners that the Petition was being returned because the petition for a writ of certiorari was untimely. Resp. App. 13a-14a. By letter dated January 16, 1997, Petitioners indicated that they were no longer seeking a writ of certiorari. Resp. App. 15a. The "Petition for a Writ of Mandamus," redacted to excise references to any request for certiorari but otherwise identical to the original petition, was docketed with the Court on January 22, 1997.

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6 Following the scheduling of an evidentiary hearing by the district court on, *inter alia*, the issue of whether all of the Petitioners had signed a General Undertaking containing the Choice Clause, Lloyd's had filed a petition for a writ of mandamus.

REASONS FOR DENYING THE WRIT

I. Mandamus Is Not An Appropriate Remedy

A writ of mandamus is a "drastic and extraordinary remed[y]." Ex parte Fahey, 332 U.S. 258, 259 (1947). The Court is "unwilling to utilize [mandamus] as a substitute for appeal" and the writ "should be resorted to only where appeal is a clearly inadequate remedy." Id. at 260. See also Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 32 (1943) (a court may not "substitute mandamus for an appeal"). Absent a showing by the petitioner that there is "no other adequate means to attain the relief he desires," Kerr v. United States Dist. Court, 426 U.S. 394, 403 (1976); that the lower court's ruling involved an abuse of judicial power, Allied Chemical Corp. v. Daiflon, 449 U.S. 33, 35 (1980); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382 (1953); Roche, 319 U.S. at 27; and that exceptional circumstances justify an extraordinary writ, a writ should not issue. See also Sup. Ct. R. 20.

As demonstrated below, the Fourth Circuit's power to order dismissal in connection with its consideration of a motion to stay a preliminary injunction is well established and, contrary to Petitioners' claims, the court's use of expedited procedures was authorized by and fully in compliance with the Federal Rules of Appellate Procedure. All Petitioners have shown is their dissatisfaction with the Fourth Circuit's ruling. Such dissatisfaction, though legally groundless, could have been addressed by a petition for a writ of certiorari, and cannot warrant the exercise of this Court's power to issue an extraordinary writ.

A. The Court of Appeals Had The Power to Dismiss The Case

Petitioners' contention that the Fourth Circuit abused its power by directing dismissal of the action is contrary to this Court's decision in Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986).

Thornburgh makes clear that once the parties are properly before an appellate court on an appeal from the grant of a preliminary injunction, the court has jurisdiction and power to decide substantive questions of law going to the merits.[7] Moreover, the authority of the Fourth Circuit is even more evident here than in Thornburgh because the evidentiary record in connection with the enforceability of the Choice Clause was closed when the motion to dismiss was submitted, with Petitioners having been afforded discovery, expert submissions, extensive briefing, an evidentiary hearing, and lengthy oral argument.

In Thornburgh, the plaintiffs challenged the constitutionality of a state statute and sought preliminary and permanent injunctive relief preventing its enforcement. 476 U.S. at 752. The district court denied the request for preliminary injunctive relief except as to one section of the act which it found violated the Constitution. Id. at 753. The plaintiffs appealed the denial of the injunction and the defendants cross-appealed from the grant of the injunction as to one section of the act. Id. Despite the fact that only the denial and the grant of preliminary injunctive relief were before the court, the court of appeals reached the merits of the action and held that several sections of the act were unconstitutional, ordering permanent injunctive relief. Id.

In this Court, the Thornburgh defendants claimed that the court of appeals had improperly reached decisions on the merits when it should only have decided whether the district

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7 Petitioners concede that the Fourth Circuit had personal jurisdiction over them. Pet. 14 n.6. For this reason, Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), is completely inapposite. In Torres, the Court held that under the former Rule 3(c) of the Federal Rules of Appellate Procedure, the failure to name a party in the notice of appeal meant that the circuit court never acquired personal jurisdiction over the party. Id. at 317. See also Fed. R. App. P. 3(c) advisory committee's note.

court had abused its discretion in its rulings on the preliminary injunction motion. Id. at 755. This Court rejected that argument and affirmed the power of the court of appeals to reach the merits of the case:

> [I]f a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction . . . That a court of appeals ordinarily will limit its review in a case of this kind to abuse of discretion is a rule of orderly judicial administration, *not a limit on judicial power*.

Id. at 757 (footnote omitted) (emphasis supplied). See also 16 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure, § 3921.1 (1996) ("Jurisdiction of the interlocutory appeal is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development.").

The court of appeals' decision to reach the merits in such a situation and to order appropriate relief is not a usurpation of power and therefore is not subject to review by writ of mandamus. See Will v. United States, 389 U.S. 90, 95 (1967) ("While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."). Courts of appeals regularly make final judgments on the merits even though the notice of appeal does not specifically request such relief. See, e.g., American Cyanamid Corp. v. Connaught Labs., Inc., 800 F.2d 306, 310 (2d Cir. 1986) ("the appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is entirely void of

merit") (quoting Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67, 70 (2d Cir.), cert. denied, 385 U.S. 971 (1966)); Energy Action Educ. Found. v. Andrus, 654 F.2d 735, 745 & n.54 (D.C. Cir. 1980) ("we . . . perceive no interests to be served by further delaying consideration of the basic statutory issue dominating this protracted litigation, a question of law which cannot be illuminated by the development of additional facts at trial"), rev'd on other grounds, 454 U.S. 151 (1981); Allstate Ins. Co. v. McNeill, 382 F.2d 84, 87 (4th Cir. 1967) (circuit court "may and should resolve all other questions adjudicated by the decree" when party challenges the district court's jurisdiction to have issued an injunction), cert. denied, 392 U.S. 931 (1968).[8]

1. The Enforceability of the Choice Clause Rested Solely on a Question of Law.

Under Thornburgh, on an appeal from the grant or denial of a preliminary injunction, an appellate court has the power to reach the merits when its decision is based on "a premise as to the applicable rule of law." 476 U.S. at 757. Here, it is indisputable that the Fourth Circuit's disagreement with the district court as to the enforceability of the Choice Clause rested solely on the legal issue of whether enforcement of the Choice Clause was contrary to public policy.

The district court and the Fourth Circuit agreed that the

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8 The reason for such a rule is clear:

> Any other rule frequently would require wasted litigation without any offsetting advantage in economy of appellate effort or uninterrupted trial court proceedings.

16 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 3921.1 (1996).

enforceability of the Choice Clause was to be measured by the four prong test articulated by this Court in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972).[9] Allen, 94 F.3d at 928; see also Allen, No. 3:96cv522, Pet. App. 54a. Both the Fourth Circuit and the district court also agreed that the Choice Clause was not unreasonable under the first three prongs of the test. Allen, 94 F.3d at 928 ("we agree with the district court that the first three bases for finding unreasonableness do not apply here"); see also Allen, No. 3:96cv522, Pet. App. 54a ("The first three circumstances are not presented here."). It was only the application of the fourth prong – whether enforcement of the Choice Clause was in contravention of a "strong public policy of the forum state" – as to which the two courts differed. Allen, 94 F.3d at 928.

A decision whether a contractual provision violates public policy is necessarily a matter of law, not a question of fact. American Cas. Co. v FDIC, 39 F.3d 633, 638 (6th Cir. 1994) ("A question of contract interpretation, including whether a . . . [provision] violates public policy, is a question of law which this court reviews de novo."); St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695, 702 (8th Cir. 1992) ("Like other questions of contract interpretation, whether . . . [a provision] violates public policy is a question of law which we review de novo."); Cross v. American Country Ins. Co., 875 F.2d 625, 628 (7th Cir. 1989) ("The question of whether a contract is enforceable under considerations of public policy is a

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9 Under this Court's seminal decision in The Bremen, choice of forum and choice of law provisions are presumptively enforceable unless one of four exceptions is found: 1) the clause was induced by fraud or overreaching; 2) enforcement will deprive the complaining party of his day in court; 3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or 4) enforcement would contravene a strong public policy of the forum state. The Bremen, 407 U.S. at 12-13, 15, 18. See also Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 595 (1991).

conclusion of law."). See also W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983) ("the question of public policy is ultimately one for resolution by the courts"). Both the district court's denial of the motion to dismiss, and the Fourth Circuit's determination to enforce the Choice Clause, were therefore based on a premise as to the applicable rule of law.[10]

2. The Evidentiary Record on Enforceability of the Choice Clause Was Complete.

Petitioners' argument that the Fourth Circuit's opinion is "replete" with "references to critical factual issues, hotly disputed in the district court, as to which Petitioners are now denied . . . their constitutionally guaranteed opportunity to present evidence" is a red herring. Pet. 16.[11] It does not matter

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10 The Fourth Circuit had two primary bases for its decision that the Choice Clause did not contravene a strong public policy of the United States. First, it held that enforcing the Choice Clause would not "subvert the United States securities laws' policy of prohibiting *fraud*," because English law provided adequate remedies and deterrents. Allen, 94 F.3d at 929. Second, the court found that Congress did not intend to export the disclosure requirements of the United States securities laws to markets conducted in foreign countries. Id. Each of these holdings – the adequacy of English law protections for fraud and Congress' intent with regard to the United States securities laws – is a paradigm of a conclusion of law, not a question of fact. See Fed. R. Civ. P. 44.1 (determination of content of foreign law is a question of law for the court); Greenpeace, Inc. v. Waste Techs. Indus., 9 F.3d 1174, 1178 (6th Cir. 1993) (discerning congressional intent is part of the legal matter of statutory construction). The court's two additional bases for holding the Choice Clause enforceable – principles of comity and the interests of the international Lloyd's insurance market – are also decisions of law, not of fact. Allen, 94 F.3d at 930; see Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876, 884 (5th Cir. 1982) ("[W]hether any other principle of comity . . . prevents the district court from entertaining the suit is a question of law . . . ."), vacated on other grounds, 460 U.S. 1007 (1983).

11 Petitioners' citation to a number of alleged findings of fact made by

Footnote continued

whether certain issues were "hotly disputed" in the district court. Under Thornburgh, all that matters is whether more facts remained to be developed at a trial on the merits with respect to the enforceability of the Choice Clause. Here, the evidentiary record on the critical issue upon which the Fourth Circuit rested its opinion – the enforceability of the Choice Clause – was complete at the close of the hearing before the district court.

Petitioners took discovery, submitted expert affidavits, and participated fully in an extensive evidentiary hearing. By failing to raise any additional evidentiary or legal point before submission of the motion to dismiss for decision to the district court, Petitioners waived their right to do so. Frietsch v. Refco, Inc., 56 F.3d 825 (7th Cir. 1995). See also Michel v. Louisiana, 350 U.S. 91, 99 (1955) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.") (citation omitted).

In Frietsch, the defendants moved to dismiss for improper venue on the ground that a choice of forum clause required the plaintiffs to bring any suit in Germany. 56 F.3d at 827. The district court granted the motion. Id. The plaintiffs then tried to argue to the district court, on a motion for reconsideration, and to the court of appeals, that there was

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Footnote continued from previous page

the Fourth Circuit is irrelevant. Pet. 17, 20, 23. Even if Petitioners are correct that the Fourth Circuit made findings of fact that it should not have - which Lloyd's disputes - these findings relate solely to the Fourth Circuit's alternate holdings that Names were not being offered securities in Equitas and that Lloyd's was not engaging in a proxy solicitation. Allen, 94 F.3d at 930-32. The holdings are unnecessary to the Fourth Circuit's determination that, as a matter of law, the Choice Clause was enforceable.

additional information that showed that the choice of forum provision was invalid and that the defendant was not entitled to enforce the provision. Id. at 828. The court of appeals rejected these arguments, holding that the plaintiffs' failure to present these facts in opposition to the motion to dismiss constituted a waiver. Id.

As in Frietsch, Petitioners here waived their right to present additional evidence or argument on the Choice Clause. Once the motion to dismiss was fully submitted to the district court, either a judgment of dismissal would be entered, or a trial on the merits of their securities laws claims would be held.

3. The Fourth Circuit Had the Power to Decide the Case on an Expedited Basis.

Similarly, Petitioners' argument that the Fourth Circuit erred in its use of expedited procedures to decide this case is not an issue that is properly reviewed on a petition for a writ of mandamus. Rule 2 of the Federal Rules of Appellate Procedure specifically grants the courts of appeals the power to expedite cases where necessary. Fed. R. App. P. 2 & advisory committee note; Groendyke Transp., Inc. v. Davis, 406 F.2d 1158, 1161 (5th Cir.) ("The Rule – set out perhaps purposefully at the very beginning – recognizes the need for special handling *and the parallel existence of power*.") (emphasis supplied), cert. denied, 394 U.S. 1012 (1969).

Therefore, the Fourth Circuit's decision to use expedited procedures was within its power. As such, the Fourth Circuit's "decision, even if erroneous . . . involved no abuse of judicial power, and any error which it may have committed is reviewable . . . by this Court by writ of certiorari," not by writ of mandamus. Roche, 319 U.S. at 27. See also Will, 389 U.S. at 103-04 ("[T]he most that can be claimed on this record is that [the lower court] may have erred in ruling on matters within [its] jurisdiction. . . But '[t]he extraordinary writs do not reach to such cases. . .'") (quoting Parr v. United States, 351 U.S. 513, 520 (1956)).

B. Petitioners Could Have Sought Review By Writ of Certiorari

Petitioners not only have failed to show an abuse of judicial power, they cannot show an inability to obtain relief by means other than mandamus. If Petitioners believed that the Fourth Circuit erred in its rulings or procedures, they should have sought appellate review by this Court by petitioning for a writ of certiorari to the Fourth Circuit. See 28 U.S.C. § 1254(1). In their initial attempt at filing with this Court, Petitioners sought relief by way of mandamus *or* certiorari. See January 2, 1997 letter from Clerk, Resp. App. 13a-14a. It was only after being advised that their petition for a writ of certiorari was untimely that Petitioners' request for relief became one for solely a writ of mandamus. See January 16, 1997 letter from Kilpatrick & Cody, Resp. App. 15a. Petitioners' acknowledgment that the Court could have considered their request for relief by way of a writ of certiorari dooms any claim that review by writ of mandamus is appropriate.[12]

Petitioners have therefore failed to sustain their burden of showing a "clear and indisputable" entitlement to the extraordinary writ. Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 384 (1953) (quoting United States v. Duell, 172 U.S.

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12 Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927), and Schlagenhauf v. Holder, 379 U.S. 104 (1964), provide no authority for the issuance of a writ of mandamus in the present case. In both of those cases, mandamus was the appropriate means of challenging a decision by a district court precisely because the alleged abuses – referral of all patent cases to a special master in Los Angeles Brush, and compelling the defendant to submit to a Fed. R. Civ. P. 35 examination in Schlagenhauf – occurred prior to any appealable decision by the district court and could not, in the Court's judgment, be adequately remedied by subsequent appeal after final judgment or an appealable interlocutory order. In the present case, the Fourth Circuit's decision was susceptible to immediate review by this Court on writ of ceritorari.

576, 582 (1899)). Their request for such extraordinary relief should be denied.

II. Petitioners Were Not Denied Due Process

The Federal Rules of Appellate Procedure do not create due process rights and, in any event, it is undeniable that Petitioners had notice and an opportunity to be heard. Substantial portions of both Lloyd's Brief in Support of the Motion to Stay the Preliminary Injunction and the response by Petitioners in their Brief in Opposition to Lloyd's Motion for a Stay were devoted to extensive discussion of and arguments about the merits of the Choice Clause issue.

A. The Federal Rules of Appellate Procedure Do Not Confer Due Process Rights

Petitioners' due process argument hinges on the premise that the Federal Rules of Appellate Procedure vest appellees with due process rights. Pet. 12-14, 21. This argument ignores the text of the Rules and the relevant authority and imputes a purpose to the Rules that does not exist.

Rule 2 of the Federal Rules of Appellate Procedure states:

> In the interest of expediting decision, or for other good cause shown, *a court of appeals may . . . suspend the requirements or provisions of any of these rules* in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

(emphasis supplied). As the Advisory Committee explained:

> The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules.

Fed. R. App. P. 2 advisory committee's note. If the court of appeals is permitted by the Rules to suspend the Rules, the Rules cannot possibly create a liberty interest protected by the Fifth Amendment. See Groendyke Transp., Inc. v. Davis, 406 F.2d 1158 (5th Cir.), cert. denied, 394 U.S. 1012 (1969) (special, summary proceedings do not violate due process). Cf. League of Voluntary Hosps. and Homes v. Local 1199, 490 F.2d 1398, 1401 (Temp. Emer. Ct. App. 1973) (court rejected claims of defendants that Temporary Emergency Court of Appeals violated their due process rights by reducing briefing time, allegedly in violation of the court's rules, because the court's rules permitted expedited procedures).

In Groendyke, the court of appeals specifically rejected the premise that Rules 28, 30, and 31 – three of the Rules allegedly "abrogated" by the Fourth Circuit in this case – have the force of statute or prescribe any procedure that must be followed. The court, citing Rule 2, rejected the argument that its use of expedited procedures on appeal was improper and held that "nothing in the constitutional concept of due process forbids special, summary disposition without all of the marks of a traditional submission." 406 F.2d at 1162.

The Fourth Circuit's expedited disposition of this case was consistent with its power under Fed. R. App. P. 2 and did not result in a due process violation.

B. Petitioners Had Notice That The Choice Clause Was At Issue

Lloyd's motion for a stay pending appeal was based on, among other things, the argument that because the Choice Clause was enforceable, the finding by the district court that Petitioners had a likelihood of success on the merits was erroneous. In other words, the two issues (likelihood of success on the merits and the enforceability of the Choice Clause) were "inextricably entwined." SEC v. Van Waeyenberghe, 990 F.2d 845, 847 n.3 (5th Cir. 1993).

Indeed, Petitioners acknowledge that they were fully aware that the question of the enforceability of the Choice Clause was inseparable from Lloyd's motion for a stay of the preliminary injunction. Pet. 7-8, 20 n.11. Petitioners devoted almost ten pages of their Brief in Opposition to Lloyd's Motion for a Stay, more than 20% of the brief, to the argument that "The District Court Correctly Held That The Forum Selection Clause Was Unenforceable." For Petitioners now to argue that they were unaware that the enforceability of the Choice Clause was at issue is disingenuous, at the least.[13]

Moreover, it is not a due process violation for a court to consider an issue not explicitly identified in the notice of appeal. In Foman v. Davis, 371 U.S. 178 (1962), this Court held that the Federal Rules of Appellate Procedure are to be liberally construed. Id. at 182.[14] Liberal construction of Rule 3(c) means that failure to state a specific ground for appeal in the notice of appeal does not preclude review of other rulings. See Smith v.

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13 Given this notice, and the Petitioners' extensive briefing on the Choice Clause, the nearly three hours of oral argument held by the Fourth Circuit on August 27, 1996 were more than enough to fulfill the Fifth Amendment's minimum requirements for a constitutionally sufficient hearing. It bears noting, however, that although due process did not require it, Petitioners had no fewer than three further procedural options available to them for seeking to modify or set aside the Fourth Circuit's ruling: (a) a request for reconsideration or rehearing by the three-judge panel; (b) a suggestion for rehearing by the Fourth Circuit *en banc*; and (c) a request for review by this Court on writ of certiorari. Petitioners availed themselves of the first two options and sought to avail themselves of the third option before being informed by the Clerk's office that their petition for certiorari was untimely filed.

14 Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), on which Petitioners rely, is not to the contrary. In Torres, the Court explicitly stated that its decision was not contrary to its holding in Foman that the Federal Rules of Appellate Procedure should be "liberally construed." Torres, 487 U.S. at 316 See also supra at 12 n.7.

Barry, 502 U.S. 244, 247-48 (1992); United States v. Rochester, 898 F.2d 971, 976 n.1 (5th Cir. 1990). All that is required for review is that the parties have notice, through the briefs or otherwise, that the issue will be raised. Van Waeyenberghe, 990 F.2d at 847 n.3. Petitioners had such notice here. Moreover, "where 'claims or issues are inextricably entwined, each may be reviewed even though not referred to in the notice of appeal.'" Id. (quoting C.A. May Marine Supply Co. v. Brunswick Corp., 649 F.2d 1049, 1056 (5th Cir.), cert. denied, 454 U.S. 1125 (1981)). Petitioners were well aware that their probability of success on the merits, and the enforceability of the Choice Clause, were so entwined.

III. The Fourth Circuit Followed Well-Established Precedent In Enforcing The Choice Clause

Petitioners argue that, if only the Fourth Circuit had taken a different procedural course and permitted Petitioners a more leisurely briefing schedule, it would have ruled for the Petitioners. The premise of this argument – that the Fourth Circuit's ruling erroneously decided "unresolved issues about the extraterritorial reach of disclosure obligations under U.S. securities laws and the application of the anti-waiver provisions in those laws" to international forum selection and choice of law agreements (Pet. 12) – is simply untrue. The Fourth Circuit's ruling is fully consistent with established precedent of this Court and four other courts of appeal. Petitioners' dissatisfaction with the result does not support the grant of an extraordinary writ of mandamus.

A. The Fourth Circuit's Holding Followed This Court's Decisions and Was Identical to That of Every Other Court of Appeals to Have Decided the Question

In ruling that the Choice Clause required dismissal of petitioners' action, the Fourth Circuit followed this Court's well-established line of cases holding that forum selection clauses in "truly international" commercial agreements are presumptively

enforceable. See, e.g., The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

As the Court stated in Scherk, 417 U.S. at 516:

> [U]ncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.[15]

Moreover, the application of this Court's precedent to the Choice Clause is far from a novel issue in the federal courts. In holding the Choice Clause enforceable, the Fourth Circuit's ruling was consistent with that of every other court of appeals to consider the enforceability of the Choice Clause in litigation brought by U.S. Names asserting federal securities claims against Lloyd's. Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021 (1992);

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15 Significantly, the Court's holding in Scherk required dismissal of claims asserted under Section 10(b) of the Exchange Act in favor of contractually-specified arbitration in Paris, and the Court expressly rejected the argument that the "anti-waiver" provision of the Exchange Act precluded such dismissal. 417 U.S. at 509, 514-15. Likewise, in The Bremen, the Court's holding required dismissal of the action in favor of contractually-specified litigation in England although the Court was fully aware that the English courts would give effect to an exculpatory clause that would be held void as against public policy if the matter were litigated in the U.S. courts. 407 U.S. at 23 (Douglas, J., dissenting).

Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993); Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994). See also Shell v. R.W. Sturge Ltd., 55 F.3d 1227, 1231 (6th Cir. 1995) (enforcing Choice Clause to dismiss action brought under Ohio securities statute by U.S. Names and rejecting argument that public policy of Ohio required that Choice Clause be denied enforcement).[16] In each of these cases, the court of appeals held that Lloyd's was entitled to dismissal of the actions for improper venue because the policies of the federal securities laws, including the policies represented by the "anti-waiver" provisions of Section 14 of the Securities Act, 15 U.S.C. § 77n, and Section 29(a) of the Exchange Act, 15 U.S.C. § 78cc(a), did not represent a strong public policy of the forum sufficient to overcome the presumption of enforceability of forum selection clauses in truly international agreements. In each of these cases this Court denied certiorari.

Petitioners attempt to distinguish this case from Riley, Roby and Bonny, and thus buttress their assertion that the Fourth Circuit's procedures led it to error, by arguing that those

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16 The Choice Clause has also been enforced by a number of federal district courts to dismiss actions involving federal securities claims. Richards v. Lloyd's of London, No. 94-1211-IEG (POR), 1995 U.S. Dist. LEXIS 6888, 1995 WL 465687 (S.D. Cal. May 1, 1995), appeal docketed, No. 95-55747 (9th Cir. Oct. 13, 1995); McDade v. NationsBank of Texas, No. H-94-3714, 1995 U.S. Dist. LEXIS 21095 (S.D. Tex. June 26, 1995); Haynsworth v. Lloyd's of London, 933 F. Supp. 1315 (S.D. Tex. 1996), appeal docketed, No. 96-20769 (5th Cir. Aug. 23, 1996); Tufts v. Corporation of Lloyd's, 95 Civ. 3480 (JFK), 1996 U.S. Dist. LEXIS 12606, 1996 WL 533639 (S.D.N.Y. Sept. 19, 1996). See also Ashenden v. Lloyd's of London, No. 96 C 852, 1996 U.S. Dist. LEXIS 18336, 1996 WL 717464 (N.D. Ill. Dec. 9, 1996) (rejecting argument that public policy of Illinois securities laws precluded enforcement of Choice Clause). But see Leslie v. Lloyd's of London, No. H-90-1907, 1995 U.S. Dist. LEXIS 15380, 1995 WL 661090 (S.D. Tex. Aug. 25, 1995), appeal docketed, No. 96-20805 (5th Cir. Sept. 4, 1996).

cases involved the anti-fraud provisions of the securities laws while this case involves the disclosure provisions of the securities laws. Pet. 11, 22. The distinction drawn is both untrue and unhelpful to Petitioners.

First, in Riley, in Roby, and in Bonny, the plaintiffs alleged both violations of Section 10(b) of the Exchange Act, 15 U.S.C. § 78j, *and* violations of Section 12(1) of the Securities Act, 15 U.S.C. § 77*l*(1). Riley, 969 F.2d at 956; Roby, 996 F.2d at 1358; Bonny, 3 F.3d at 159. Section 12(1) is unquestionably a pure registration and disclosure provision, rather than an anti-fraud provision. The presence of disclosure claims did not stop the courts from enforcing the Choice Clause in each of those actions. See Bonny, 3 F.3d at 161 ("we are satisfied that several remedies in England vindicate plaintiffs' substantive rights while not subverting the United States' policies of *insuring full and fair disclosure by issuers* and deterring the exploitation of United States investors") (emphasis supplied); Roby, 996 F.2d at 1365 ("if [plaintiffs] were able to show that available remedies in England are insufficient to deter British issuers from exploiting American investors through fraud, misrepresentation *or inadequate disclosure*, we would not hesitate to condemn [the Choice Clause] as against public policy") (emphasis supplied); Riley, 969 F.2d at 956-57 (giving effect to Choice Clause despite plaintiff's allegations it would deprive him of all substantive rights under the federal securities laws, including § 12(1) disclosure rights). This Court nonetheless declined to review these decisions.

Second, as the Fourth Circuit held, to the extent that some provisions of the federal securities laws might reflect stronger public policy in the international context than others, it is the anti-fraud provisions that would be emphasized over the registration and disclosure provisions, rather than the reverse. Allen, 94 F.3d at 930 (citing Consolidated Gold Fields PLC v. Minorco S.A., 871 F.2d 252 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989); Restatement (Third) of the Foreign Relations Law of the United States § 416 cmt. a (1986)). Petitioners offer no

support for their argument that the disclosure requirements of the securities laws reflect a more important public policy than the anti-fraud provisions in the context of international transactions.[17]

B. The Fourth Circuit Did Not Make New Law Regarding the Extra-Territorial Effect of the Exchange Act

Petitioners' assertion that the Fourth Circuit reached an "unprecedented conclusion" regarding the extraterritorial effect of the federal securities laws, Pet. 24, ignores both the prior case law and the question which was decided by the Fourth Circuit. The Fourth Circuit's conclusion that the Choice Clause should be enforced, far from being an "unprecedented conclusion," is identical to the conclusions of the Riley, Roby, Bonny, and Shell courts.

Moreover, as the Fourth Circuit stated:

> the question . . . in this case [is] whether the choice of forum and law clauses to which the Names agreed when entering the Lloyd's insurance market implicate the anti-fraud and disclosure policies that underlie the United States securities laws *to the extent that those clauses cannot be enforced.*

Allen, 94 F.3d at 929 (emphasis supplied). The Fourth Circuit was not determining whether, in the abstract, the disclosure policies of the federal securities laws have *any* extraterritorial effect. The Fourth Circuit was only determining whether the policies of the securities laws, in the specific context of

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17 In any event, the Fourth Circuit held that Lloyd's had no disclosure obligations under § 14(a) because the R&R plan did not involve a proxy solicitation. Allen, 94 F.3d at 931-32.

Petitioners' membership of and underwriting in the international market regulated by Lloyd's, were of such unusual strength as to overcome the strong presumption of enforceability accorded forum selection clauses in international agreements. Petitioners' allegation that the entire scheme of federal securities law regulation has been eviscerated by the Fourth Circuit's decision is irrationally alarmist. The Fourth Circuit's decision rests squarely on its consideration of the unique structure and regulation of the Lloyd's market.[18]

C. The Fourth Circuit Committed No Legal Error Regarding the Position of the SEC

Petitioners' patronizing statement that the Fourth Circuit "must have been unaware" of various statutory provisions and SEC regulations on which Petitioners now wish to base their arguments, and Petitioners' bizarre statement that the Fourth Circuit failed to give the SEC the deference it is due under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), are particularly disingenuous in light of Petitioners' extremely selective disclosure of the role played by the SEC in this litigation. By order dated August 14, 1996, the district court *sua sponte* purported to order the SEC to state its views as to whether, *inter alia*,

> any aspect of the Lloyd's [R&R plan] constitute[d] a security and, if so, whether an equity security is

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18 Petitioners' criticism of the Fourth Circuit for failing to distinguish Hartford Fire Ins Co. v. California, 509 U.S. 764 (1993), misses the point. Hartford Fire was not a suit between Names and Lloyd's; indeed, Lloyd's itself, the body empowered by Parliament to regulate the Lloyd's market, was not a party to Hartford Fire. Nor did Hartford Fire challenge Lloyd's ability as a regulator to effectutate a comprehensive restructuring of the market in order to, among other things, meet solvency regulations imposed by the British Parliament.

> involved and whether any registration or disclosure requirements of the securities laws of the United States are currently being violated, or have been violated, in the solicitation of the acceptance from the Names of the [R&R plan] or any aspect thereof.

(quoted in SEC Response, Resp. App. 16a-17a).

On August 16, 1996, the SEC filed a response with the district court in which it informed the district court that it did "not believe that it would be in the public interest" for the SEC to take a position on any of these issues. See August 16, 1996 Response of the Securities and Exchange Commission to Order dated August 14, 1996, Resp. App. 18a. Petitioners are apparently arguing now that Chevron required the Fourth Circuit to rule in Petitioners' favor on the question of the applicability of Section 14(a) to the R&R plan out of deference to the same administrative agency that had expressly declined to express a view on that question when "ordered" to do so by the district court.[19] This argument is simply perverse.

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19 The SEC did file an amicus brief with the district court limited to the argument that Petitioners should be allowed to escape their contractual agreement to litigate in England and should be permitted to litigate their allegations of securities law violations, whether meritorious or meritless, in a U.S. forum. Petitioners cited this amicus brief and the SEC's position stated therein to the Fourth Circuit panel who, as is their right, reached a decision different than the SEC, and Petitioners, might have hoped. Roosevelt v. E.I. du Pont de Nemours & Co., 958 F.2d 416, 427 n.19 (D.C. Cir. 1990) (R.B. Ginsburg, J.) (the views of the SEC as amicus are not entitled to Chevron deference). See also Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 746 n.10 (1975) (declining to follow view of SEC as amicus in private plaintiff securities action); Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990) (no deference to agency views on scope of private right of action).

IV. Conclusion

For all the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2158
(CA-96-522)
FILED: August 27, 1996

LOUIS F. ALLEN; CARL K. BAKER; JOYCE P. BAKER; PETER D. BERRINGTON; OLIVER BIRCKHEAD; FLORENCE BLAUSTEIN; MARY L. BRAY; T. K. BROOKER; DONALD J. BROOKS; JOSEPH CALLAGHAN; JAMES CASSEL; TERRY G. CHAPMAN; J. A. CLAWSON; JOHN K. COLVIN; FRED B. COX; JOHN RAWLYN CHARLES CRABTREE; CHRISTOPHER P. CLUP; GORDON C. DAVIDSON; RUTHERFORD DAY; DONALD D. DOTY; M.D.A. EMBLIN; AUDREY FISHER; DONALD B. GIMBEL; KENNETH J. GIMBEL; KATHERINE GOOCH; B. G. HARRISON; YUMIKO HONDA; HERBERT W. HOOVER, III; MARGARET W. JONES; DONALD K. KENT; E. R. KINNEBREW, III; WALTER J. LEVY; ROLAND LEY; SUZANNE RHULEN LOUGHLIN; GEORGE C. LYMAN, JR.; CHARLES P. LYON; MICHAEL L. MCDERMOTT; ROBERT T. MCINERNY; ARTHUR G. MICHELS; WALTER P. MUSKAT; WALTER W. MUSKAT; A. D. PISTILLI; ROBERT A. POSNER; JUDSON P. REIS; HARRY W. RHULEN; WALTER A. RHULEN; J. O. RICKE; E. JOY ROSE; MARK S. ROSE; A. F. SMITH; OWEN B. TABOR; ALLEN M. TAYLOR; TRUDE C. TAYLOR; KARL ARONSON; JOAN R. FARROW AND JONATHAN M. FARROW FOR THE ESTATE OF JESSE M. FARROW; JACK FLECK; MARILYN FRANCKX; ISABEL L. GALLAGHER; JENNIFER A. GALLAGHER, MARY CLAIR GALLAGHER; ROBERT E. GALLAGHER; ROBERT E. GALLAGHER, JR.; THOMAS J. GALLAGHER; THOMAS H. GREEN; HENRY G. HAGER; THORNTON HUTCHINS; VINCE A. KONEN; C. C. LUCAS; HERBERT A. MIDDENDORFF; ROBERT S.

DENEBEIM; DANA FISHER, SR.; WILLIAM ALEXANDER FLORENCE; ANNE M. GALLEGHER; J. PATRICK GALLAGHER; MARK E. GALLAGHER; MARY CLAIRE GALLAGHER AS EXECUTRIX FOR JOHN P. GALLAGHER; KATHERINE GALLAGHER GOESE; ALLEN S. GREENE; ROBERT W. HATCH; MARY CLAIR G. JOHNSON; THOMAS V. LEEDS; GUY A. MAIN; EUGENE F. MIDDLEKAMP; MICHAEL MONTANA; BARBARA H. PISANI; RICHARD B. SANDERS; JACK R. TAYLOR; KEN NOACK; ROBERT L. PISANI; LARRY D. STROUP; NEVILLE G. WILLIAMS,

Plaintiffs-Appellees,

—versus—

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, a/k/a Society and Council of Lloyd's; COUNCIL OF LLOYD'S,

Defendants-Appellants,

—and—

EQUITAS HOLDINGS LIMITED; EQUITAS REINSURANCE LIMITED; EQUITAS LIMITED, a/k/a Equitas or Equitas Group,

Defendants,

CALIFORNIA INSURANCE COMMISSIONER,

Party in Interest.

ASSOCIATION OF LLOYD'S MEMBERS; GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN; NATIONAL ASSOCIATION OF INSURANCE BROKERS; CALIFORNIA INSURANCE COMMISSIONERS,

Amici Curiae.

ORDER

On the motion of appellants to stay the district court's injunction entered August 23, 1996, and upon consideration of the briefs, papers, and extensive arguments of counsel, the court grants the motion. Because the court's decision rests on its determination, to be articulated in a later opinion, that the contractual provisions among the parties selecting the law of and a forum in the United Kingdom should be enforced, we reverse and remand this case with instructions that the district court dismiss it.

ORDERED this 27th day of August, 1996, at 2:00 p.m. with the concurrence of Judge Michael and Judge Motz.

/s/ PAUL V. NIEMEYER
Judge Paul V. Niemeyer
For the Court

McGUIRE WOODS
BATTLE & BOOTHE LLP

No. of Pages (including Fax cover sheet): 2
DATE: August 22, 1996

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TO: Conrad M. Shumadine, Esq.

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LOCATION: Norfolk, VA

PHONE NUMBER: (804) 628-5500

FAX NUMBER: (804) 628-5566

FROM: Warren E. Zirkle

OFFICE: Richmond, Virginia
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Zurich	011(41-1) 225 20 00	011(41-1) 225 20 00	011(41-1) 225 20 20

SENDER'S DIRECT DIAL PHONE NUMBER: (804) 775-4364

REMARKS:

We have notified the clerk of the Court of Appeals of the possibility of an emergency appeal immediately after the entry of Judge Payne's order. The clerk suggested that the parties complete the attached Disclosure of Corporate Affiliation form in advance in order to expedite the appeal proceedings. Please fax your completed form as soon as possible to Pat Connor, Chief Deputy Clerk of The Court of Appeals, at (804) 771-8628.

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DATE: August 22, 1996

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TO: A. Stephens Clay, Esq.

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Jacksonville	904/798-3200	904/798-3200	904/798-3207
Norfolk	804/640-3817	804/640-3700	804/640-3701
Richmond	804/775-7456	804/775-1000	804/775-1061
Tysons Corner	703/712-5430	703/712-5000	703/712-5050
Washington	202/857-2830	202/857-1700	202/857-1737
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SENDER'S DIRECT DIAL PHONE NUMBER: (804) 775-4364

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Sender Name: Warren E. Zirkle

Charge No.: 0586153-0004

Employee No.: 0382

Total Charge:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 96CV522
August 23, 1996 7:00 p.m.

LOUIS F. ALLEN, *et al.*,

Plaintiffs

—VS—

LLOYD'S OF LONDON, *et al.*,

Defendants

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

WILLCOX & SAVAGE, ESQS.
Norfolk, Virginia
BY: CONRAD M. SHUMADINE, ESQ.

KILPATRICK & CODY, ESQS.
Atlanta, Georgia
BY: SUSAN A. CAHOON, ESQ.
STEPHEN E. HUDSON, ESQ.

Counsel on behalf of the Plaintiffs

McGUIRE, WOODS, BATTLE & BOOTHE, ESQS.
Richmond, Virginia
BY: WARREN E. ZIRKLE, ESQ.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSEN [sic], ESQS.
New York, New York
BY: MICHAEL H. RAUCH, ESQ.
BONNIE STEINGART, ESQ.

Counsel on behalf of the Defendants

---

[2] THE CLERK: Civil Action Number 3:96CV522, *Louis M. Allen. et al. v. Lloyd's of London, et al.* Will counsel just identify themselves for the record, please.

MR. RAUCH: Michael Rauch representing Lloyd's. Thank you for staying with us, Your Honor. We have reviewed your order. I know you have been working long and hard on this matter. I won't ask you to burden yourself any further on it.

I do want to make two points. For the reasons that we think we have articulated at the hearing, we believe that the bond is inadequate, wholly inadequate. And I know Your Honor has considered it, but I just want to raise it for you.

The second thing is, I have reviewed your order. I have not had the opportunity to read the entire opinion that Your Honor wrote. Given the shortness of time, we are going to seek an expedited appeal. We would like to request that Your Honor stay the order so that we can do so.

THE COURT: All right. Mr. Shumadine, who is going to argue?

MR. SHUMADINE: Ms. Cahoon will make the argument for the plaintiff, Your Honor.

MS. CAHOON: Your Honor, I, too, will be very brief. The court has considered these issues at great length, has determined to enter the injunction, has set a bond, which we

believe is higher than we deemed appropriate, and the court has considered both parties, both sides' arguments on these issues.

[3] Under the terms of the order, it is conditioned on our posting a bond. We, frankly, don't anticipate, given the lateness of the hour and the weekend days intervening, we don't think that's going to happen before Monday in any event. And we believe that if defendants are able to obtain expedited relief, they will have adequate opportunity to have their position considered, and this order should not be stayed.

THE COURT: Well, the first thing I would like to say is that both sides in this case have been thoroughly and very effectively well represented. I felt as if on a number of issues, I had the benefit of good papers from good lawyers. I thought that the presentation of evidence was handled effectively on both sides.

It was of help to me to have it presented the way it was. It was of help to me to have the evidence that was submitted in the form of affidavits, and the papers were of help to me.

It will be no secret to any of you that some of the issues presented are difficult ones. You will see from the opinion, however, that after wrestling with them, with the benefit of your careful and good briefs, that I have concluded that the plaintiffs have established far more than is required by the *Direx Israel* test under the likelihood of success prong here.

I also have carefully weighed and wrestled with, [4] including the filings that were made yesterday by both sides, or by both sides respecting the proposed form of order which had been tendered by the plaintiffs at the request of the court.

In this circuit, under *Long v. Robinson*, the test is that the parties seeking a stay must show that they will likely prevail on the merits of the appeal. For the reasons set forth in the order of the memorandum opinion, I do not believe that the defendants can meet that standard.

Also, the defendant must show that it will suffer irreparable injury if the stay is denied. For the reasons set forth in the memorandum opinion in the section under the preliminary

injunction that deals with the issuance of the injunction in Number 4, I believe it is, and in Number 2, the court believes that the defendants cannot meet that prong of the test.

The third prong of the test is that other parties will not be substantially harmed by the stay. I believe for the reasons set forth in part 1 of the motion for preliminary injunction order that that cannot be satisfied here either. The finding of irreparable injury here applies, not only to these parties, but to the others who have enjoyed the benefit of the injunction for the reasons explained in the opinion.

Nor do I believe that the defendants can satisfy the public interest — satisfy the public interest component, which is the fourth prong of the test under *Long v. Robinson*. That [5] being the case, and I don't have anything to say on those topics other than as said in the memorandum opinion, and I will let that speak for itself.

I will tell you that — and I don't know who it is and it doesn't make any difference to me — somebody has been in touch with the Fourth Circuit. That's exactly what I would have done if I had been in either of your positions. And I know that the opinion and order have been sent out tonight by Federal Express to the judges of the Court of Appeals. I have no idea which judges.

I have given both sides the telephone numbers where I can be reached on Monday. I will be in Alexandria. Mr. Zirkle has it for the defendants, and Mr. Shumadine has it for the plaintiffs.

I hope that you can tell from the order and from the opinion that I consider this to be a matter of utmost seriousness and that I intend to be available to whatever end is required.

I have established a trial date. I did it without consulting with you. I took the first date that I thought it could reasonably be accomplished. And if you all think you can accomplish it before that date, I will provide a trial date earlier than that.

I also have set a schedule for a pretrial conference on August 30th. Events before the Fourth Circuit might make

[6] that unnecessary. If, however, that is what we are to do, if it is necessary, I have told Mr. Zirkle and Mr. Shumadine, while Mr. Rauch and I think Ms. Cahoon were on the telephone respectively, that I have seen you all work together effectively and I expect you to continue that.

I'm not married to that date, and I will do whatever is reasonably necessary to accommodate your own schedules. I picked it because I want you to know that I am here. I am available. I believe that this matter can be concluded promptly. And if you want to move the dates, you certainly may.

I would like for you to express to those members of your firms who are not here my appreciation for the assistance they have rendered in this case, and it has been important to me to have had that assistance. Is there anything else that needs to be done?

MR. RAUCH: I don't want to have a discussion about this now, Your Honor, but in light of your mentioning of the date, I do want to advise the court that I think my wife expects me to be with her on the 30th of August, and I know Ms. Steingart has a little holiday planned. Therefore, we may be asking you to move those dates. In light of that, I want to give you first notice of it.

THE COURT: That's fine. We will work with your schedules, and I expect counsel to work together. I have seen [7] you do it. I don't have any problems sliding any dates. We will work around what makes sense. Thank you all very much, and you have a good evening.

(The proceedings were adjourned)

I, Sandra M. Beverly, certify that the foregoing transcript is a correct record of the proceedings taken and transcribed by me to the best of my ability.

_____ _____

SANDRA M. BEVERLY, RPR Date

[LETTERHEAD OF THE SUPREME COURT
OF THE UNITED STATES]

January 2, 1997

A. Stephens Clay
Kilpatrick & Cody
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309-4530

RE: In Re Louis F. Allen, et al.

Dear Mr. Clay:

Returned are 39 copies each of a petition for a writ of certiorari and appendix received, after hours, December 10, 1996 in the above-entitled case. Also returned is check number 4561, dated December 9, 1996, in the amount of $300 submitted as the docketing fee. The petition is returned due to the fact that it appears to be untimely filed. The time for filing appears to have expired December 2, 1996, 90 days from September 3, 1996, the date of the opinion of the U.S. Court of Appeals for the Fourth Circuit. The time does not begin to run from the date a petition for rehearing en banc is denied but from the date a petition for rehearing is denied. Rule 13.3.

In civil cases, once the time has expired under 28 U.S.C. section 2101(c), this Court is without authority to docket a petition out of time. Rule 13.2 directs the Clerk to refuse to file a petition which is jurisdictionally out of time.

Sincerely,
William K. Suter, Clerk
By:

Loretta S. Ruffin
(202) 479-3039

Enclosures

cc: Warren E. Zirkle
Harvey Pitt
Cynthia T. Andreason
Patricia S. Conner, Clerk
USCA 4 - No. 96-2158

[LETTERHEAD OF KILPATRICK & CODY, L.L.P.]

January 16, 1997

Via Federal Express

Mr. Francis J. Lorson
Chief Deputy Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: *In re Louis F. Allen, et al*

Dear Mr. Lorson:

I am writing to confirm that you are authorized to regard the petition filed by Louis F. Allen, et al. in the referenced matter as solely a petition seeking a writ of mandamus. We will physically mark the copies of the petition to delete all references to any alternative prayer for a review on certiorari. It is my understanding that, with this authorization and the deletion of such references, the petition for a writ of mandamus to the United States Court of Appeals for the Fourth Circuit will be accepted and docketed with the Supreme Court.

Thank you very much for your consideration.

Sincerely yours,

/s/ SUSAN A. CAHOON
Susan A. Cahoon

SAC/sr
Encls.
cc: Warren E. Zirkle
Harvey Pitt
Cynthia T. Andreason
Patricia S. Connor, Clerk, Fourth Circuit
Court of Appeals - (4th Cir. No. 96-2158)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action File No. 3:96CV522

LOUIS F. ALLEN, *et al.*,

Plaintiffs,

—v.—

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, a/k/a SOCIETY AND COUNCIL OF LLOYD'S; COUNCIL OF LLOYD'S,

Defendants.

RESPONSE OF THE SECURITIES AND EXCHANGE COMMISSION TO ORDER DATED AUGUST 14, 1996

The Securities and Exchange Commission respectfully submits this response to the Court's Order of August 14, 1996. The order seeks a statement, to be submitted by today, of the Commission's position whether, under the securities laws of the United States:

> (1) the Names' original participation in Lloyd's, by way of the General Undertaking or otherwise, constituted a security; and (2) any aspect of the Lloyd's Reconstruction and Renewal constitute a security and, if so, whether an equity security is involved and whether any registration or disclosure requirements of the securities laws of the United States are currently being violated, or have been violated, in the solicitation of the acceptance from

> the Names of the Reconstruction and Renewal or any aspect thereof.

The Commission recognizes that the Court is in the difficult position of having to make decisions on complex questions of law in a short period of time. It is the policy of the Commission to endeavor to aid the courts whenever possible, and it is with great regret that the Commission informs the Court that it is unable to provide greater assistance in this case than it has previously provided.

The Commission is not a party to this action. On August 9, 1996, it filed a Memorandum as *amicus curiae* in response to the Court's July 30, 1996 Order requesting the Commission's views. In that Memorandum the Commission limited itself to one legal issue: whether the choice of law and choice of forum clauses in the General Undertaking entered into between Lloyd's and the Names are void to the extent they require the plaintiffs to forgo any securities law claims they may have.

With respect to the other issues presented in the pleadings, the Commission advised the Court (Memorandum at 4):

> The other principal issues that have been raised in this case are mixed questions of law and fact and may turn on the resolution of factual disputes. The factual record in this case is, of course, incomplete. Moreover, even were there to be a full factual record before the Court at this time, we do not believe it would be appropriate for the Commission to offer its views as *amicus curiae* on the resolution of what are or may be essentially factual issues.

The Commission reiterates that it does not believe it appropriate to address, as *amicus curiae*, the fact-bound issues listed in the Court's August 14 order. The Commission generally appears as *amicus curiae* only to address questions of law in situations where the facts are not in dispute or have been decided by a lower court.

Beyond those concerns, the Commission does not believe that it would be in the public interest for it to influence, positively or negatively, the matter of the acceptance or rejection of the Reconstruction & Renewal proposal by the Names. The parties to this action, and others who are directly interested in its outcome, have taken strong positions in support of and in opposition to the proposal. They are all represented by counsel who are well-equipped to present to the Court the facts and legal arguments which support their positions and to argue against the positions of others.

In light of the Commission's policy of neutrality, the Commission has in its discretion voted not to take a position at this time on the issues in this case beyond that addressed in the August 9 Memorandum, and has instructed its counsel to so advise the Court.

The Commission understands the Court's order to be a request for its views. To the extent that the order was intended to compel the Commission to formulate and/or express views on these issues, the Commission respectfully submits that the Court does not have the authority to compel a non-party to do so. To the extent the Court's order was intended to have such effect, the Commission requests that the Court vacate it.

Respectfully submitted,

/s/ RICHARD H. WALKER (by ES)
Richard H. Walker
General Counsel

/s/ JACOB H. STILLMAN
Jacob H. Stillman
Associate General Counsel

/s/ ERIC SUMMERGRAD
Eric Summergrad
Principal Assistant General Counsel

/s/ JOHN W. AVERY
John W. Avery
Attorney Fellow

Securities and Exchange Commission
450 5th Street, N.W. (Stop 6-6)
Washington, D.C. 20549

Of Counsel

PAUL GONSON
Solicitor

Dated: August 16, 1996

CERTIFICATE OF SERVICE

I hereby certify that, on the 16th day of August, 1996, I caused one copy of the foregoing Response of the Securities and Exchange Commission to Order Dated August 14, 1996, to be served on counsel for the parties to this case, by telecopier and by Federal Express delivery service, as follows:

Conrad Shumadine, Esq.
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1111 East Main Street
Richmond, Virginia 23218
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/s/ ERIC SUMMERGRAD
Eric Summergrad
Principal Assistant General Counsel